

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 26, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP2500**

**Cir. Ct. No. 2012CV23**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**CITY OF PORT WASHINGTON,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID A. THOMPSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
SANDY A. WILLIAMS, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.<sup>1</sup> David A. Thompson was convicted in municipal court for the City of Port Washington of operating a motor vehicle

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

while under the influence of an intoxicant (OWI) and operating with a prohibited alcohol concentration (PAC) pursuant to WIS. STAT. § 346.63(1)(a) and (b). Thompson appealed to the circuit court on the issue of whether his blood alcohol concentration (BAC) was above .15, and the jury found that it was. Thompson now challenges this finding, arguing that expert testimony used at trial was inadmissible due to a lack of foundation. We hold that it was not an erroneous exercise of discretion for the circuit court to admit the testimony. Thompson's objection to the expert's retrograde extrapolation testimony—calculating backwards in time from a blood test to estimate the defendant's BAC at the time of driving—goes to the testimony's weight, not its admissibility. Affirmed.

## BACKGROUND

¶2 Thompson was pulled over at 2:12 a.m. on October 29, 2010, for failing to display a front license plate. When the arresting officer made contact with Thompson, the officer observed signs of intoxication including a glassy-eyed look, slow coordination, and unnaturally delayed responses. The officer administered field sobriety tests, which led to defendant's arrest for OWI. A blood sample was taken from Thompson at 3:24 a.m., one hour and twelve minutes after he quit driving. The test showed a BAC of .154 percent. A breath test was performed at 4:30 a.m., two hours and eighteen minutes after Thompson quit driving. The final reading showed a BAC of .11 percent.

¶3 At trial in the Ozaukee County Circuit Court, the City called Susan Hackworthy, the chief of the chemical test section of the State Patrol of Wisconsin, to testify in regard to Thompson's chemical blood and breath tests.

Hackworthy testified that she was specially trained in forensic science regarding alcohol absorption.<sup>2</sup> She described the use of average alcohol elimination rates to calculate a person's BAC at the time a vehicle had been operated based on subsequent blood and breath tests. Over Thompson's objection, she was permitted to testify that his BAC at the time of driving would have been above .15. Thompson's initial objection to this testimony for lack of foundation was sustained, and the City was asked to lay a stronger foundation for Hackworthy's testimony. Hackworthy then explained how the body absorbs alcohol and detailed her experience as an expert on alcohol absorption and retrograde calculation, including teaching at training seminars for state troopers, prosecutors and defense attorneys. She also indicated that her calculations cannot be exact because "we couldn't know exactly what [Thompson's] absorption or elimination rate was at that time. No one was there at the time of the stop so I use a range which is an average range which has been tried and true over many, many years." Thompson repeated his foundation objection when the prosecutor asked Hackworthy to explain her calculations to the jury, and this time it was overruled.

¶4 In her testimony, Hackworthy admitted that her calculation assumed that Thompson was not still absorbing alcohol when his blood sample was taken. The prosecution asked her: "And your calculations which sort of go backward in time to the time of the driving, assume that [Thompson] consumed no alcohol between the driving and the time the blood was drawn?" Hackworthy answered that this was correct. On cross-examination, defense counsel asked her if in her hypothetical, about which she had demonstrated the calculations, the person was

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<sup>2</sup> Thompson does not challenge Hackworthy's qualifications.

eliminating or absorbing alcohol, and Hackworthy said “That person ... would be eliminating alcohol because it’s an hour after the time of driving.” Counsel said: “You don’t know the drinking history,” and Hackworthy responded “That is correct.” On redirect, the prosecution had the following exchange with Hackworthy:

[Prosecutor]: Ma’am, you understood that at the time you made these calculations preliminarily and repeated that today that the defendant told the officer he hadn’t consumed any alcohol; isn’t that true?

[Hackworthy]: That is correct.

[Prosecutor]: And now you know having sat in to hear the defendant’s testimony [that he drank six beers that night and left the bar at 1:55 a.m.] that’s not correct, right?

[Hackworthy]: That is correct.

[Prosecutor]: And in the end, you only have the self-reporting of the subject as to what they drank, how much, and when to rely on; isn’t that true?

[Hackworthy]: That is true.

The jury found that Thompson had an alcohol concentration above .15.

¶5 Thompson contends that the circuit court erred in admitting Hackworthy’s testimony because it lacked foundation. Thompson additionally contends that Hackworthy’s testimony was not relevant and therefore should have been excluded. *See State v. Donner*, 192 Wis. 2d 305, 316, 531 N.W.2d 369 (Ct. App. 1995) (expert testimony is admissible if relevant). The City counters that the assumption in Hackworthy’s calculation related to the weight of the evidence, not its admissibility.

## STANDARD OF REVIEW

¶6 A circuit court's decision to admit or exclude evidence is reviewed under an erroneous exercise of discretion standard. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The reviewing court cannot hold that an erroneous exercise of discretion occurred if there is a rational basis for a circuit court's decision. *State v. Watson*, 227 Wis. 2d 167, 186-87, 595 N.W.2d 403 (1999). If the circuit court fails to provide reasoning for its evidentiary decision, the appellate court independently reviews the record to determine whether the circuit court properly exercised its discretion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

## ANALYSIS

¶7 Thompson contends that the circuit court erred by allowing Hackworthy's testimony because the testimony lacked foundation due to Hackworthy's assumption that Thompson was not still absorbing alcohol when his blood sample was taken. Had Thompson still been in the absorption stage, he would have had a lower BAC at the time of arrest than that indicated by the blood test, because his BAC would have risen since his arrest. Hackworthy's calculation assumes that Thompson was in the elimination stage, and thus his BAC would have been higher at arrest because his BAC would have fallen since the time of arrest. In Thompson's view, Hackworthy lacked foundation in concluding that Thompson's BAC was above .15 during his intoxicated driving because she did not know whether he was in the absorption stage at the time of the test. Thompson argues that it was an erroneous exercise of discretion for the circuit court to admit this hypothetical expert testimony. Thompson additionally contends that the evidence was irrelevant and therefore inadmissible.

¶8 The circuit court did not erroneously exercise its discretion in admitting Hackworthy's testimony. To be admissible, expert testimony must assist the fact finder in understanding the evidence or determining a fact in issue. WIS. STAT. § 907.02.<sup>3</sup> The record shows that Hackworthy disclosed the methodology and explained how her calculations could be inaccurate. She explained in detail the process of alcohol absorption and elimination, and why she applied an average range. Defense counsel was able to cross-examine her on the assumptions upon which her calculations were based. While Thompson complains that Hackworthy failed to make a "connection between Mr. Thompson's testimony regarding his consumption and his level of absorption," the record indicates that Hackworthy's calculations took into account Thompson's repeated denial to the arresting officer that he had anything to drink. *See* WIS. STAT. § 907.03 (expert may base opinion on facts made known at or before hearing). While Thompson then testified at trial that he drank six beers, defense counsel was free to explore the effect this change in testimony would have on Hackworthy's assumptions and calculations. The jury was able to weigh the evidence and decide for itself whether to agree with Hackworthy's calculation. It was reasonable for the circuit court to conclude the testimony would assist the jury in its determination of whether Thompson's BAC was above .15.

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<sup>3</sup> WISCONSIN STAT. § 907.02, governing expert testimony, was amended in 2011 to adopt the federal standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The new version of the statute, requiring that "the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case," first applied to cases commencing after February 1, 2011. *See* 2011 Wis. Act 2, §§ 34M, 45. Thompson was cited on November 17, 2010, so the old standard applies to this case.

¶9 Thompson's relevancy argument also fails because Hackworthy's calculation makes more or less probable the only fact at issue: whether Thompson was above a .15 BAC when he drove. Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. WIS. STAT. § 904.01. Hackworthy's testimony could be used by the jury to determine whether it was more or less probable that Thompson's BAC was above .15, therefore it is relevant evidence.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

